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No. 02-1632

IN THE
Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Writ of Certiorari
to the Washington Court of Appeals, Division III

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This Court's holding in *Ring v. Arizona,* 536 U.S. 584 (2002), is straightforward and clear-cut: The *Apprendi* rule applies to any aggravating fact necessary to expose a defendant to punishment beyond an otherwise mandatory statutory limit. As Petitioner explained in his opening brief, that is exactly the situation here. Washington's Sentencing Reform Act, just like the Arizona capital sentencing system at issue in *Ring*, authorizes a court to increase punishment above an otherwise mandatory statutory limit only if it finds a particular kind of aggravating fact. Washington provides an illustrative list of such facts, and the increased punishment in this case is based upon one of the very same enumerated aggravators (cruelty) that the sentencing judge invoked in *Ring*.

The State and its *amici* try to distinguish Washington's system from Arizona's based upon amorphous notions of legislative "evasion," statutory "nonexclusivity" and judicial "qualitative judgments." But these contentions simply fail to come to grips with *Ring*. Whatever adjectives might be used to describe Washington's system, it remains that a Washington court, just like an Arizona court, may not impose a sentence above the standard statutory limit unless it finds a legislatively designated type of fact that is not accounted for in the guilty verdict. It is this reality that makes the *Apprendi* rule applicable here.

The State and its *amici* also exaggerate the practical implications of applying the *Apprendi* rule to structured sentencing systems. Such systems are easily adaptable to *Apprendi*'s requirements. Many states, in fact, already have guideline-type statutes that conform to *Apprendi,* and administering such a system in Washington would not place undue strain on its criminal justice system.

I. The Top of a Standard Sentencing Range in Washington Is a "Statutory Maximum" as a Matter of Federal Law.

The State argues that the top of a standard range in Washington is not actually a "statutory maximum" under *Apprendi* for two reasons: (A) Washington law labels the longest permissible exceptional sentence "the statutory maximum" sentence, Resp. Br. at 17-19, 26-27; and (B) the Washington Legislature did not intend to "manipulate" the elements of crimes or to "evade" the *Apprendi* rule in enacting the aggravating-facts portion of the Sentencing Reform Act. Resp. Br. at 29-32. Neither argument withstands scrutiny.

A. *Apprendi* Defines a Statutory Maximum as the Harshest Statutory Sentence That May Be Imposed Based Solely on a Guilty Verdict.

The question whether a certain sentencing threshold is a "statutory maximum" for purposes of *Apprendi* is unquestionably one of federal law. Both *Apprendi* and *Ring* involved state criminal sentencing statutes, yet this Court proceeded in both cases to determine whether the sentencing threshold at issue constituted such a maximum. In each opinion, this Court defined "statutory maximum" as "the maximum [the defendant] would receive if punished according to the facts reflected in the [guilty] verdict alone." *Id.* at 483; *see also Ring*, 536 U.S. at 604 ("the maximum punishment" the defendant could have received "[b]ased solely on the jury's verdict finding him guilty of [the charged offense]"). In other words, if the sentence a court imposes "may not legally be imposed . . . unless at least one aggravating factor is found to exist," the sentence exceeds a statutory maximum, regardless of how state law labels the particular statutory threshold that the sentence exceeds. *Ring*, 536 U.S. at 597; *see also id.* at 604; Petr. Br. at 16-17.

Under this definition, the top of a standard range dictated by Wash. Rev. Code § 9.94A.310 is a statutory maximum. That statute sets limits that a sentencing court may not exceed unless it finds at least one aggravating fact "that was not an element of the crime" of conviction. *State v. Cardenas*, 129 Wn.2d 1, 9, 914 P.2d 57 (1996); *accord State v. Gore*, 143 Wn.2d 288, 315-16, 21 P.3d 262 (2001); Resp. Br. at 24 ("a factor that is already considered in setting the standard ranges will not justify an exceptional sentence"). Only if the court finds such a fact may it impose a sentence longer than the standard statutory range.

It is true, as the State points out numerous times, that an exceptional sentence may not exceed a second cap found in Wash. Rev. Code § 9A.20.021. *See also* Wash. Rev. Code § 9.94A.120(14) (cross-referencing this provision). But the critical point here is that the top of a standard range – here, 53 months – is the maximum statutory term authorized "[b]ased solely on the [guilty] verdict." *Ring*, 536 U.S. at 597. A sentencing court has no discretion to exceed that limit unless it finds at least one valid aggravating fact.[1]

B. Identification of a Statutory Maximum Does Not Turn on Whether the Legislature Intended to Evade *Apprendi*.

The Washington Legislature's intent in enacting the aggravating-fact provisions of the Sentencing Reform Act

[1] The trial court's "notice" to Petitioner that it had the authority to find an aggravating fact and to impose an exceptional sentence of up to ten years (*see* Resp. Br. at 34-36) could not alter this reality. This notice simply explained to Petitioner the way that Washington law works – something of which all Washington citizens already have constructive notice. And providing notice of an unconstitutional sentencing procedure cannot validate that procedure. In any event, neither the State nor the trial court ever told Petitioner before he entered his plea that it might consider his conduct to involve deliberate cruelty or to implicate any other aggravating circumstance.

cannot alter the conclusion that the top of a standard range dictated by Wash. Rev. Code § 9.94A.310 constitutes a statutory maximum. Neither the right to trial by jury nor the beyond-a-reasonable-doubt rule of *In re Winship,* 397 U.S. 358 (1970), turn on legislative intent. Rather, as both *Apprendi* and *Ring* make clear, the applicability of these constitutional rules depends solely on whether a legislature has created a system under which a court may not impose a sentence exceeding a certain level unless it finds an additional fact not comprised in the guilty verdict. *See Apprendi,* 530 U.S. at 490; *Ring,* 536 U.S. at 592, 597.

The *Ring* decision is particularly instructive here. There the Arizona Legislature enacted the statutory scheme at issue with purest of motives: to comply with this Court's Eighth Amendment jurisprudence requiring that states winnow the pool of death-eligible defendants to avoid undue arbitrariness. *See Ring,* 536 U.S. at 606-07; *id.* at 610-11 (Scalia, J., concurring). Not one speck of evidence suggested that Arizona was trying to avoid any constitutional rule. Yet this Court deemed Arizona's noble intent irrelevant and unflinchingly applied *Apprendi.* "The dispositive question," this Court explained, is one of "'*effect*'": "If a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact . . . must be found by a jury beyond a reasonable doubt." *Ring,* 536 U.S. at 602 (quoting *Apprendi,* 530 U.S. at 494) (emphasis added); *see also Mullaney v. Wilbur,* 421 U.S. 684, 699 (1975) ("The rationale of [*Winship*] requires an analysis that looks to the *effect and operation* of the law as applied and enforced by the state.") (internal quotation omitted) (emphasis added).

This Court should not deviate from this effects-based test. Discerning the motivation of a legislative body is always "a hazardous matter," for "the search for the 'actual' or the 'primary' purpose of a statute is likely to be elusive." *Michael M. v. Superior Court,* 450 U.S. 464, 469-70 (1981) (quotation

omitted); *see also Palmer v. Thompson,* 403 U.S. 217, 225 (1971) (frequently "difficult or impossible" to determine the dominant motivation behind legislation). When the applicability of the constitutional provisions at issue do not turn on whether a legislature intended to evade them, there is no need to engage in such a troublesome inquiry.

II. Neither the "Illustrative" Nor the "Qualitative" Nature of Washington's Enumerated Aggravating Factors Removes Them From the Purview of *Apprendi.*

Despite the clear result that the "statutory maximum" test of *Ring* and *Apprendi* dictates here, the State, echoed by the United States, contends that Washington's Sentencing Reform Act is distinguishable from the system in *Ring* because the statutory list of potential aggravating factors in Washington is "illustrative" instead of exclusive. The State and the United States also assert that Washington's exceptional sentence system employs decisively different aggravating factors from those in *Ring* because Washington's factors involve "qualitative judgment[s]." United States Br. at 18. No Washington court has ever advanced either of these arguments. Nor has the State ever done so before its brief on the merits here. And for good reason: these efforts to distinguish *Ring* both (A) distort Washington law and (B) misconstrue the *Apprendi* rule.

A. The Sentencing Reform Act Requires a Sentencing Judge to Find a Legislatively Designated Type of Fact in Order to Impose an Exceptional Sentence.

The State and the United States suggest that the Washington Legislature "has left the judgment about which facts justify a more serious punishment to the sentencing judge" and that the Sentencing Reform Act permits judges to

impose exceptional sentences upward based on "virtually unlimited" sets of facts. United States Br. at 22, 16; *see also* Resp. Br. at 24 ("It is a court's discretion, and not the finding of any particular fact, that justifies an exceptional sentence."). These statements, however, mischaracterize Washington law. Far from granting sentencing courts open-ended discretion to decide which facts may justify imposing an exceptional sentence upward, the very point of the Sentencing Reform Act is to shift from a system in which a sentencing court has "absolute discretion to do whatever it pleases" to one in which such discretion is significantly limited by legislative directives. *State v. Ammons,* 105 Wn.2d 175, 181, 718 P.2d 796 (1986).[2]

The Act's basic requirement that aggravating facts evince a "substantial and compelling reason" to impose an exceptional sentence, Wash. Rev. Code § 9.94A.120(2), thus operates just like any other component of a criminal statute: It establishes a legal standard and then requires the factfinder (here, the sentencing court) to find facts that meet that standard. The Act sets forth eleven acceptable aggravating factors, many with numerous subparts. *See* Wash. Rev. Code § 9.94A.390(2). The vast majority of exceptional sentences in Washington rest on one or more these enumerated factors. *See* Washington Sentencing Guidelines Commission, *Statistical Summary of Adult Felony Sentencing – Fiscal Year 2002* 44 (2003) <http://www.sgc.wa.gov/Stat%20Report%202002.pdf> (rank-

[2] In *Ammons*, in fact, the defendant argued that the Sentencing Reform Act violated Washington's separation-of-powers doctrine because it abolishes courts' absolute discretion and requires judges to rely on a statutorily permissible finding to impose a sentence above the standard range. The Washington Supreme Court rejected this argument, explaining that there was no problem with such a requirement because "the fixing of legal punishments for criminal offenses is a legislative function." *Ammons,* 105 Wn.2d at 180; *see also State v. Alexander,* 70 Wn. App. 608, 615-17, 854 P.2d 1105 (1993) (elaborating on legislative constraints on sentencing discretion of trial judges).

ing most frequently invoked aggravating facts, including vulnerable victim, deliberate cruelty, and position of trust).

To be sure, the Act provides that these enumerated aggravating factors are merely "illustrative." Wash. Rev. Code § 9.94A.390. But as the word "illustrative" implies, the Washington Supreme Court has explained that if a trial court invokes an unenumerated aggravator to justify an exceptional sentence, that factor must be "analogous" to an enumerated one. In *Cardenas,* for example, the sentencing judge departed upward in a vehicular assault case on the basis of the fact that the victim suffered multiple injuries. The Washington Supreme Court ruled that this reason was invalid because the infliction of multiple injuries is a permissible aggravating fact only when the injuries were caused by multiple acts. The Court explained:

> Requiring multiple acts is consistent with the original rationale for using multiple injuries as a valid aggravating factor, a rationale *analogous to the statutorily recognized factor of multiple incidents of major economic offenses.* [citation omitted.] Thus, where the defendant has committed multiple acts in causing the injuries, the *analogy* to multiple economic offenses is appropriate.

129 Wn.2d at 8 (emphasis added). Other decisions disallowing proposed aggravators confirm that an unenumerated aggravating factor is valid only if it is comparable to an enumerated factor. *See, e.g., Gore,* 143 Wn.2d at 321 ("Extrapolating from the statutory aggravating factors respecting economic and drug crimes, a high degree of sophistication or planning is necessary for the nonstatutory planning aggravator to justify an exceptional sentence.") (emphasis removed); *Chadderton,* 119 Wn.2d at 398 ("The

reckless abuse of trust may operate as an aggravating factor by analogy to . . . RCW 9.94A.390(c)(iv).").[3]

A sentencing court's finding of an aggravating factor, therefore, is much more than an exercise in "transparency," *compare* Resp. Br. at 22, 23, 25; it is a legislatively mandated prerequisite that the court find *a particular kind of additional fact* before imposing a sentence longer than the top of the standard range. Just as in *Ring,* of course, no specific fact need be found. But it is misleading for the State to suggest that "the judge need only articulate a reason for the departure." Resp. Br. at 21. If the trial court here had sentenced Petitioner to 90 months in prison for some "articulate[ed] reason" that was not a legitimate aggravating fact beyond the elements of his crime, the sentence would have been illegal. *See, e.g., State v. Chadderton,* 119 Wn.2d 390, 395, 832 P.2d 481 (1992) (collecting examples of invalid sentences in this regard).

Furthermore, if the trial court had relied on the legitimate aggravating factor of "deliberate cruelty with domestic violence" without also finding facts that supported that invocation, the sentence also would have been illegal. *See, e.g., State v. Strauss,* 54 Wn. App. 408, 416-19, 773 P.2d 898 (1989) (reversing such an exceptional sentence). The Sentencing Reform Act expressly provides that "[w]henever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written *findings of fact* and conclusions of law." Wash. Rev. Code § 9.94A.120(3)

[3] The State's suggestion that *State v. Baldwin,* 150 Wn.2d 448, 78 P.3d 1005 (2003), holds that any additional fact can be an acceptable aggravator so long as a court explicitly offers it (Resp. Br. at 25) is incorrect. There, the sentencing court imposed an exceptional sentence upward based on an enumerated aggravator, and the Washington Supreme Court noted that "any other substantial and compelling reasons may support a sentence outside the standard range." *Id.* at 459. Nothing in opinion addresses what types of factual findings satisfy the default "substantial and compelling reason" standard.

(emphasis added). Lest there be any doubt, the Washington Supreme Court has explained in no uncertain terms that there must be sufficient "*evidence in the record* to support the reasons for imposing an exceptional sentence." *Gore,* 143 Wn.2d at 315 (emphasis added); *see also State v. Talley,* 83 Wn. App. 750, 762, 923 P.2d 721 (1996) ("[A] court could find grounds for an exceptional sentence *if the State can prove the facts necessary to support them.*") (emphasis added), *aff'd,* 134 Wn.3d 176, 949 P.2d 358 (1998); *State v. Borg,* 145 Wn.2d 329, 36 P.3d 546 (2001) (finding evidence insufficient to satisfy enumerated aggravating factor).

In sum, only by invoking a legally valid aggravator and by finding facts to support that invocation does a Washington sentencing court acquire the legal authority to use what the United States calls its "qualitative judgment" to decide whether to impose an exceptional sentence upward.

B. Washington's System for Imposing Exceptional Sentences Upward Operates in All Relevant Legal Respects the Same as the Arizona System Invalidated in *Ring.*

In light of a proper understanding of Washington law, the State's and the United States' argument is that the *Apprendi* rule should not apply when: (1) a statutory prerequisite for an increased sentence is phrased in somewhat generic terms, such that it may be satisfied by illustrative enumerated factors or analogous unenumerated factors; and (2) a court's decision whether to impose a heightened sentence turns not only on whether an aggravating factor is present, but also on a "qualitative" determination of some sort.[4] The *Apprendi* rule, however, does not contain an exception for either situation.

[4] The State also suggests that this case is distinguishable from *Ring* because factual findings exposing a defendant to an increased prison term should be treated differently under *Apprendi* than findings exposing a defendant to the

1. The *Apprendi* rule does not contain an exception for statutory provisions that may be satisfied by either enumerated or analogous, unenumerated factors.

The defendant in *Ring* had his sentence increased because the judge found that his crime involved two of Arizona's ten potential aggravating circumstances, one of which was that he acted in an "especially heinous, *cruel*, or depraved manner." *Ring*, 536 U.S. at 592 n.1, 595 (emphasis added). Petitioner's sentence was increased here for almost exactly the same reason: the judge found that his offense involved one of Washington's eleven potential aggravating circumstances, namely "domestic violence with *deliberate cruelty*." J.A. 18 n.4 (emphasis added).[5] The State and the United States assert, however, that the factual finding that made Petitioner's heightened punishment possible is not subject to *Apprendi* because although the judges here and in *Ring* both relied on a legislatively specified aggravating fact of cruelty, the judge here, unlike the judge in *Ring*, could have relied instead on an analogous, unenumerated factor.

This assertion makes no sense. Neither *Ring* nor any other of this Court's opinions indicates that the *Apprendi* rule applies only when an enumerated list of permissible aggravating factors is exclusive and lacks any generally

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death penalty. Resp. Br. at 28-29. But, as Petitioner explained in his opening brief, this Court expressly held in *Ring* that the *Apprendi* rule applies with equal force in "both" situations. *Ring*, 536 U.S. at 609, *quoted in* Petr. Br. at 18. The *Apprendi* rule is a product of the Due Process Clause's *Winship* rule and the Sixth Amendment, not the Eighth Amendment or any other capital punishment doctrine.

[5] Although the State asserts at one point that Petitioner's enhanced sentence rests "solely on the basis of" the trial court's domestic violence finding, Resp. Br. at 30, the Court of Appeals' opinion on this point is crystal clear: the trial court's finding of "domestic violence *with deliberate cruelty* supports the exceptional sentence here." J.A. 18 n.4 (emphasis added).

defined "catchall" component. To the contrary, this Court consistently has held that "*any fact*" other than a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be proved to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 489 (emphasis added); *see also Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) ("any fact"). This is because *Apprendi*'s central concern is that a defendant not "be expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict [or guilty plea] alone." *Ring*, 536 U.S. at 602 (quoting *Apprendi*, 530 U.S. at 483). A sentencing system violates this tenet whenever it allows a judge, on the basis of finding an additional fact, to impose a sentence beyond the statutory maximum established by the guilty verdict. The degree to which such an additional fact is legislatively specified beyond a generic statutory definition is immaterial.

Deviating to any extent from this bright-line rule would exponentially complicate the *Apprendi* doctrine, both in terms of theory and application. Legislatures often cannot foresee every permutation of a particular type of conduct. Thus, innumerable statues use "general words" to indicate a covered class and follow those words with "specific words in a statutory enumeration," thereby "restrict[ing] application of the general term to things that are similar to those enumerated." William K. Eskridge, Jr., et al., Cases and Materials on Legislation 823 (3d ed. 2001) (quotation omitted); *see also Hughey v. United States*, 495 U.S. 411, 418-19 (1990) (interpreting "catchall" statutory phrase in line with enumerated factors); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973) ("catchall provision . . . bring[s] within a statute categories similar in type to those specifically enumerated"). Indeed, almost every statute contains at least one phrase that could be elucidated with greater specificity. There is, accordingly, no theoretical reason to distinguish between unadorned statutory classes and

statutory classes that happen to be illustrated by specific examples. For purposes of applying *Apprendi*, both statutory approaches must be treated in the same fashion.

Nor is there any sound practical reason for making the *Apprendi* rule depend on whether a statutory standard's illustrative examples are exclusive. It makes no difference to a defendant whether his sentence is increased based on a factor on an enumerated list or on some analogous factor that satisfies a more generic statutory standard. Either way, a legislature has allowed a judge to make the critical finding that leads to increased punishment. Indeed, if this Court were to accept the State's and the United States' argument, the Arizona Legislature presumably could vindicate the capital sentencing system invalidated in *Ring* by adding a general phrase such as "or any other similar reason" to its list of aggravating factors. The New Jersey Legislature could vindicate the law invalidated in *Apprendi* by adding a similar phrase to its hate-crime enhancement statute. Such "formalistic" gestures, which would not afford any increased procedural protections to defendants, cannot to satisfy the Sixth Amendment or the Due Process Clause. *See Ring*, 536 U.S. at 604.

2. The *Apprendi* rule does not contain an exception for statutory provisions that allow sentencing courts to employ "qualitative judgments."

Under the Sentencing Reform Act, as the United States notes, "the ultimate exposure of the defendant to a sentence above the presumptive range turns not solely on facts, but on the sentencing court's [and the appellate courts'] qualitative judgment that those facts provide 'substantial and compelling reasons' for an exceptional sentence." United States Br. at 8. Nothing, however, about employing this type of "qualitative judgment" removes the Act's exceptional sentence system from the purview of *Apprendi*.

(a) It is irrelevant that imposing an exceptional sentence upward is discretionary instead of mandatory.

Both the State and the United States rely heavily on the fact that the Sentencing Reform Act provides only that the court "may" impose an exceptional sentence upon finding an aggravating fact. Wash. Rev. Code § 9.94A.120. Finding such a fact does not "mandat[e]" that the court impose a heightened sentence. Resp. Br. at 21-22; United States Br. at 19-21. To the extent that this detail in Washington law can be characterized as permitting courts to employ their "qualitative judgment" regarding whether to impose an exceptional sentence, it makes no difference for purposes of applying the *Apprendi* rule.

Apprendi is not limited to facts that mandate a heightened sentence. Rather, this Court consistently has held that the *Apprendi* rule applies to any fact that causes an "increase in the defendant's *authorized* punishment." *Ring*, 536 U.S. at 602 (emphasis added).[6] The Arizona law invalidated in *Ring*, for instance, did not mandate the death penalty upon the finding of an aggravating fact; such a finding simply "authorize[d]" that penalty, subject to the judge's additional determination there were no mitigating circumstances "'sufficiently substantial to call for leniency.'" *Id.* at 593 (quoting Ariz. Rev. Stat. § 13-

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[6] For numerous other passages using similar formulations, see *Apprendi*, 536 U.S. at 482-83 (*Apprendi* applies to "the determination of a fact that, if found, *exposes* the criminal defendant to a penalty exceeding the [otherwise-applicable] maximum") (emphasis altered); *id.* at 484 (rule applies if "defendant *faces* punishment beyond that provided by a statute" is additional fact is present) (emphasis added); *id.* at 469 (rule pertains to "a factual determination *authorizing* an increase in the maximum prison sentence") (emphasis added); *id.* at 498 (Scalia, J., concurring) (rule applies to all facts that determine "the length of the sentence to which [the defendant] is *exposed*") (emphasis added); *Jones*, 526 U.S. at 243 n.6 (rule applies any fact that "increases the *maximum penalty* for a crime") (emphasis added).

703(F)). In *Jones*, this Court likewise applied what became the *Apprendi* rule even though the additional factual finding at issue simply raised the permissible prison sentence from 15 years to "not more than 25 years." *Jones*, 526 U.S. at 230 (quoting 18 U.S.C. § 2119(2)). And in *Apprendi* itself, this Court noted that the additional finding at issue was "legally significant" not because it mandated any particular sentence, but because "it increased – indeed, it doubled – *the maximum range within which the judge could exercise his discretion.*" 530 U.S. at 474 (emphasis added).

The reason the *Apprendi* rule applies to any fact that *authorizes* increased punishment is that both the Sixth and Fourteenth Amendments apply to every factual finding that is "legally essential to the punishment to be inflicted." *Harris v. United States*, 536 U.S. 545, 561 (2002); *see also Ring*, 536 U.S. at 603-04 (if some aggravating fact must exist in order for a certain sentence to be imposed, the fact at issue must be treated as element); *Jones*, 526 U.S. at 248 (all facts that "determin[e] a statutory sentencing range" must be treated as elements). A fact that merely authorizes a sentence above an otherwise prescribed statutory limit is just as essential to such a heightened sentence (if one, in fact, is imposed) as a fact that demands such a sentence. Consequently, Washington's permissive exceptional sentence system implicates *Apprendi* just as surely as a mandatory enhancement system would.

(b) It is irrelevant that sentencing courts must determine whether the facts they find constitute a "substantial and compelling reason" to impose a heightened sentence.

The State and the United States also appear to assert that Washington's exceptional sentence system is exempt from *Apprendi* because it involves "qualitative judgments" in the sense that courts must decide for themselves whether certain fact patterns satisfy the Sentencing Reform Act's "substantial and compelling reason" standard. Resp. Br. at 23; United States Br. at 18-19. This suggestion, too, misunderstands the *Apprendi* doctrine.

The requirement that courts decide whether a proffered aggravating fact is a "substantial and compelling reason" to increase a defendant's sentence – that is, whether a proffered fact constitutes a statutorily enumerated aggravator or an "analogous" unenumerated one – is an utterly ordinary legal directive. In order to find the "substantial and compelling reason" standard satisfied, a court must first find certain facts, and then it must conclude that those facts meet the statutory classification. The first inquiry might be characterized as quantitative and the second might be called qualitative. But more precisely, one would simply say, as the Washington Supreme Court has, that "the determination of the underlying facts" supporting an exceptional sentence "is a question of fact, whereas the determination of whether those facts justify an exceptional sentence is a question of law." *Cardenas*, 129 Wn.2d at 6 n.7.

Petitioner readily agrees with the United States that the latter, legal question is beyond the purview of *Apprendi*. At the same time, however, there should be no doubt that the former, factual question *is* covered by *Apprendi*. *See Apprendi*, 530 U.S. at 482-83 (rule applies to "the determination of *a fact* that, if found, exposes the criminal defendant to a penalty exceeding the [otherwise-applicable] maximum") (emphasis altered); *id.* at 490 (rule applies to "any *fact*," other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum") (emphasis added).

It makes no difference whether Washington judges used to assess these kinds of factual issues under the State's former, indeterminate sentencing system. *Compare* United States Br. at 20. Nor does it matter whether Washington judges have extensive "legal training, professional discipline, and

institutional knowledge" in this regard. *Compare* Amicus Br. of Alabama, et al., at 16. The Framers unequivocally provided in Sixth Amendment that "[i]f the defendant prefer[s] the common sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of a single judge" with respect to a factual finding that would expose him to heightened punishment, "he [is] to have it." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

That is all Petitioner submits here. He does not contend that a jury should determine the legal definition of committing domestic violence with "deliberate cruelty." But he does maintain that Washington's Sentencing Reform Act violates *Apprendi* because it deprives him of the ability to contest before a jury whether there are underlying facts here to fulfill that definition.

III. Applying *Apprendi* Here Would Not Threaten Structured Sentencing Systems.

The State and some of its *amici* warn that if this Court holds that *Apprendi* applies to Washington's structured sentencing system, "legislatures would be forced to abandon guidelines as a sentencing option." United States Br. at 33; *see also* Resp. Br. at 36-37; Amicus Br. of Alabama, et al., at 15-19. Of course, neither an interest in legal innovation nor practical "efficien[cy]" can override the Sixth Amendment's command that a jury must find "all the facts which must exist in order to subject the defendant to a legally prescribed punishment." *Apprendi*, 530 U.S. at 498-99 (Scalia, J., concurring). But even if such concerns did factor into the constitutional equation here, recent experience and common sense reveal that the State's dire predictions lack any foundation.

A. Washington's Sentencing Reform Act Could Conform to *Apprendi* by Making Modest Statutory Changes.

The State and its *amici* vastly overstate the effect that applying *Apprendi* here would have on structured sentencing systems such as Washington's. This Court's decision here will not limit states' ability to create "standard sentencing ranges" in a grid or otherwise. Nor will it affect states' ability to allow judges to depart downward from those ranges based on mitigating facts (however found) or even to impose heightened sentences based on aggravating facts. The only portion of such systems at issue here is the *procedure* for finding aggravating facts. Accordingly, to the extent that states value "transparency and regularity" in sentencing, Amicus Br. of Alabama, et al., at 16, and to the extent states believe that those values are best served through structured sentencing, they will remain free to pursue those ends through guideline systems no matter what happens in this case.

Even as to the procedures for finding aggravating facts, recent experience shows that applying *Apprendi* here requires only modest statutory adjustments. States could follow Kansas' lead, for instance, and simply provide that a jury must find aggravating facts beyond a reasonable doubt. *See* Amicus Br. of Kansas Appellate Defender Office at 6-8.[7] Then, if a jury finds an aggravator, states could still leave the decision to the judge whether to impose an enhanced sentence or to keep the defendant's punishment in the standard range. *Id.* Such a

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[7] Contrary to the Criminal Justice Legal Foundation's assertion, this solution does not "skew" guidelines or cause a problem regarding "symmetry." CJLF Amicus Br. at 7-9. The protections in the Sixth Amendment and the Due Process Clause are meant to make it harder to deprive an individual of his liberty than to confer mercy upon him. "Core concerns animating [*Apprendi*'s] jury and burden-of-proof requirements are thus absent" when judges reduce sentences based on mitigating facts. *Apprendi*, 530 U.S. at 490 n.16.

system does exactly what the State's *amici* purport to desire: it "requires juries to set the upper limit of a convict's sentence, so as to prevent erosion of the essential liberty in the [Fourteenth] and Sixth Amendments, but [does] not prevent legislatures from designing sentencing processes that blend the aptitudes of judge and jury." Amicus Br. of Alabama, et al., at 16.

Alternatively, states could treat statutory standard sentencing ranges "as suggestions that the judge may look to for guidance, but which are nonbinding" irrespective of what facts beyond the elements of the crime might be present. Christina N. Davilas, *Prosecutorial Sentence Appeals: Reviving the Forgotten Doctrine in State Law as an Alternative to Mandatory Sentencing Laws,* 87 Cornell L. Rev. 1259, 1274 & n.101 (2002); *see also* Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines,* 44 St. Louis U. L.J. 425, 428 (2000) (describing these "voluntary" guideline systems). Seven states already follow this course, *id.*, and it appears still to be "effective" in reducing sentencing disparity. Frase, 44 St. Louis U. L.J. at 436. At the same time, this approach preserves limited judicial discretion by regarding guidelines as just that – guidelines – and not rigid directives.

B. Washington Could Conform to *Apprendi* Without Any Significant Practical Difficulties.

Although the State suggests it would be impractical to require aggravating facts to be proved to a jury beyond a reasonable doubt, it exaggerates the burdens that this step would involve. The State correctly notes that in 2002 Washington courts imposed exceptional sentences upward in 2.26% (628 / 27,835) of adult felony cases. Resp. Br. at 39. But the State neglects to add that fully 93.6% of those heightened sentences were imposed because (i) the defendant "agreed" to the facts underlying the sentence (defendants often do this in exchange for the State dropping additional charges)

or (ii) because the sentence "was the result of a plea agreement in exchange for a reduced charge" regarding the crime of conviction. *2002 Statistical Summary, supra,* at 44. This means that there were contested proceedings resulting in a court's finding aggravating facts in at most *41 cases* in 2002.[8]

Requiring that the procedures for finding aggravating facts in contested cases abide by *Apprendi* would not significantly affect these statistics. Parties still would be able to negotiate agreed sentences, and they still would have an incentive to do so in the vast majority of cases. Of course, since the State would have to prove any disputed aggravators to a jury beyond a reasonable doubt, a fraction more of criminal defendants may actually contest accusations in this regard. But that is as it should be. The guiding principle of the *Winship* rule is that "[t]he genius of our criminal law is violated when punishment is enhanced in the face of reasonable doubt as to the facts leading to the enhancement." *People v. Reese,* 258 N.Y. 89, 101 (1932) (Cardozo, J.). If a defendant in Washington wishes to challenge the State's accusation that he committed an aggravated crime, he should enjoy the same procedural safeguards against an erroneous judgment with respect to the proposed aggravator as with respect to any other element of the crime. *Apprendi,* 530 U.S. at 476.

Indeed, as the ACLU notes, Washington is already "well equipped" to follow such sentencing rules. ACLU Amicus Br. at 17. Washington already provides that a jury must find beyond a reasonable doubt the facts supporting "sentence enhancements" for actions such as using a deadly weapon. *See* Wash. Rev. Code §§ 9.94A.125 & 9.94A.310(4) (deadly

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[8] One chart in the *2002 Statistical Summary* indicates that there were 628 exceptional sentences upward in 2002; another indicates that there were 645 such sentences. *Compare id.* at 24 *with id.* at 44. Defendants agreed to exceptional sentences upward in 604 cases, *id.* at 44, leaving at most 41 cases in which contested proceedings resulted in a court's finding aggravating facts.

weapon); Wash. Rev. Code § 9.94A.310(5)-(7) (drug offense in a "school zone"; selling drugs to a minor; criminal activity in correctional facility); *State v. Nass,* 76 Wn.2d 368, 370, 456 P.2d 347 (1969). These enhancements have exactly the same effect on a defendant's sentence as finding an aggravating fact does – namely, they authorize punishment above the otherwise applicable standard statutory range but still within the ultimate caps laid out in Wash. Rev. Code § 9A.20.021(1). *See, e.g.,* Wash. Rev. Code § 9.94A.310(4)(g).

In 2002, Washington courts imposed sentences incorporating enhancements for the use of a deadly weapon in 411 cases – a number that is about two-thirds as large as the total number of exceptional sentences upward imposed for *any* reason. *2002 Statistical Summary, supra,* at 20-21. There is no evidence that the procedures governing these weapon findings imposed any undue strain on Washington's criminal justice system. The plea in this case, in fact, included a deadly weapon finding, and the State does not suggest that this inclusion presented any practical difficulty. J.A. 7, 27 ¶ 2.3. Accordingly, the State cannot credibly argue that it "would not be manageable," Resp. Br. at 40, to require Washington courts, like Kansas courts, to find aggravating facts in the same manner that they already find other "sentence enhancers."

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Washington Court of Appeals and hold that the procedures in Washington's Sentencing Reform Act for finding the aggravating facts necessary to impose Petitioner's exceptional sentence upward are unconstitutional.

Respectfully submitted,

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